United States Court of Appeals
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, (AFL-CIO) AND CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Appellants,*	No. 18877
VS.	
CURTIS CONSTRUCTION CO., a corporation, *Appellee.*	

Appeal from the United States District Court for the Eastern District of Washington, Southern Division

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLEE'S BRIEF

FILED
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JURISDICTION

This is an action by a subcontractor on the construction of Ice Harbor Dam in the Eastern District of Washington, an activity affecting commerce. It was instituted against labor organizations there engaged in representing and acting for members employed on the project by the prime contractor. Such organizations engaged in strikes and concerted refusals to handle certain articles with the object of requiring the prime contractor to

assign certain work to their members in violation of Section 303(a)(4) and (b) of the Labor-Management Relations Act (1947), (29 U.S.C.A. §187(a)(4) and (b); Clerk's Transcript 1-2).

This is one of three cases arising from substantially the same state of facts, tried and argued together before the trial court, and as to which appellants have filed a consolidated brief. We will follow their procedure of referring to the Clerk's Transcript as "CT" and the Reporter's Transcript as "RT." All evidence in the Montag (prime contractor) case, No. 18875 in this court, was to be considered in this, the Curtis (subcontractor) case (RT 8). While identical in most respects, the Pre-trial Order on Liability Issues in Curtis included the additional contention that a breach of contract by the prime contractor was no defense against Curtis. Also, it was agreed that because of the work stoppages, Montag was unable to accept concrete aggregate from Curtis, requiring the latter to suspend operations during those periods (CT 21).

ARGUMENT

It is appellee Curtis' position that appellants engaged in conduct proscribed by Section 303(a)(4) of the Labor-Management Relations Act, 1947 (29 U.S.C.A. §187(a)(4)); that the parent international organization was liable both as a joint tort feasor and under the law of principal and agent; and that appellee is entitled to damages of $42,877.92 and costs as found by the trial court.

CONDUCT VIOLATED ACT

Appellants deny violation of Section 303(a)(4) upon the premise that the statute applies only where two labor organizations actively compete for a work assignment. We find no such limitation therein:

> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is— . . . (4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work."

The only exception is where the employer "is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work." §303(a)(4), 29 U.S.C.A. §187(a)(4).

Appellants' interpretation has been rejected by the courts:

> *Vincent vs. Steamfitters Local, etc.,* 288 F. (2d) 276, 278 (CCA 2, 1961);

Local 978, United Brotherhood of Carpenters, etc. vs. Markwell, 305 F. (2d) 38, 47 (CCA 8, 1962);

McLeod vs. N. Y. Paper Cutters, etc., 220 F. Supp. 133, 136 (DC, N.Y., 1963).

In the first case it is stated with respect to a Section 8(b)(4)(D) (29 U.S.C.A. §158(b)(4)(D)) proceeding:

> "Appellant argues that this section makes the proscribed activity an unfair labor practice when there is a jurisdictional dispute between two unions for a single work assignment but that it has no applicability otherwise. A literal reading of the statute does not support so limited an interpretation. Economic coercive activity directed at an employer by a union that seeks work assignments for its members to the exclusion of other workers is the same coercive activity irrespective of whether the employees it seeks to replace are union members or are not union members. And the employer, whom Section 8(b)(4)(D) is designed to protect, is threatened with the same prospective business inactivity. Section 8(b)(4)(D) applies to the dispute here."

In *Local 978,* it was held:

> "Appellants also contend that the facts here do not establish a true 'jurisdictional dispute.' While §158(b)(4)(D) and its counterpart §187(a)(4) are of particular aid in disputes involving two rival unions within an employer organization, it is clear that these sections are also applicable when the dispute might be said to be solely between an employer and a union."

Appellants' argument is that 303(a)(4) must be construed in the same manner as 8(b)(4)(D), that the latter must be interpreted in connection with Section 10(k), (29 U.S.C.A. §160(k)) and that it, in turn, is applicable only to such a dispute. On the contrary, the authorities seem squarely to hold that the private remedy offered by Section 303(a)(4) is independent of and not limited by the administrative procedures contemplated by 8(b)(4)(D) and 10(k).

> *International, L. & W. U. vs. Juneau Spruce Corp.,* 342 U. S. 237, 243-244, 96 L. Ed. 275, 72 S. Ct. 235 (1952);
>
> *NLRB vs. Radio & Telev. Broadcast Engrs.,* 364 U. S. 573, 585, 5 L. Ed. 302, 81 S. Ct. 330 (1961);
>
> *International Longshoremen's, etc. vs. Juneau Spruce Corp.,* 189 F. (2d) 177, 187 (CCA 9, 1951);
>
> *NLRB vs. Radio & Telev. B.E.U.,* 272 F. (2d) 713, 715 (CCA 2, 1959).

Juneau Spruce was an employer's action for damages under 303(a)(4). It was contended that the statute must be read in the light of 8(b)(4)(D) and applied only to picketing occurring after a National Labor Relations Board determination that the acts complained of amounted to unfair labor practices. It was stated by the Supreme Court at 342 U. S. 243-244:

> "Section 8(b)(4)(D) and §303 (a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; §303(a)(4), to a judgment for damages. The fact that the two sections have an

identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of §303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by §303(a)(4) are rendered unlawful 'for the purposes of this section only,' thus setting apart for private redress, acts which might also be subjected to the administrative process. The fact that the Board must first attempt to resolve the dispute by means of a §10(k) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power, as is the provision in §10(k) that upon compliance 'with the decision of the Board or upon such voluntary adjustment of the dispute,' the charge shall be dismissed. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in §303(a)(4). Section 303(a)(4) as explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.

"The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to employees 'in another labor organization' or in another 'class'."

The *Juneau Spruce* case had come up from the Ninth Circuit. Answering the contention that a 10(k) determination must precede liability under Section 303(a)(4), this court held at 189 F. (2d) 187:

"No such limitation appears expressly in Section 303(a)(4). Section 10(k) provides that whenever an unfair labor practice charge is filed under Section 8(b)(4)(D) the Board is 'empowered and directed to hear and determine the dispute***.' There is no reference in Section 10(k) to Section 303(a)(4). The argument of appellants rests primarily on identical language of Section 8(b)(4)(D) and Section 303(a)(4) and on the fact that a special procedure is set out in the Act for determining jurisdictional disputes.

"The difficulty with the position of the appellants is that it is inconsistent with the plain language of Section 303(a)(4). . .

"As we view this Section of the Act, a plaintiff, to maintain an action for damages, is required to show that a labor organization has engaged in or induced the employees of any employer to engage in a strike, etc. and that an object of such conduct was to force or require any employer to assign particular work to employees in a particular labor organization or group rather than to employees in another group; and further that the employer is not failing to conform to a Board order or certification determining the bargaining representative for employees performing such work. All of these requirements were adequately pleaded and proved in the instant case."

NLRB vs. Radio & Television Broadcast, etc., was concerned with the extent of the Board's obligation to "determine the dispute" under Section 10(k) before imposing sanctions under 8(b)(4)(D). It was argued that "substantive symmetry" should be preserved between 303(a)(4) on the one hand and 8(b)(4)(D) and 10(k) on the other. The Court, citing *Juneau Spruce,* held at 364 U. S. 585:

> "This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes. Since we do not require a 'substantive symmetry' between the two, we need not and do not decide what effect a decision of the Board under §10(k) might have on actions under §303(a)(4)."

The case came from the Second Circuit. In discussing the Board's argument for "internal consistency of the Act's provisions," the circuit court at 272 F. (2d) 715, said of the *Juneau Spruce* Supreme Court opinion:

> ". . . the Supreme Court's decision rests on the premise that the two sections are not to be construed *in pari materia.* It is to be expected that the considerations which underlie the grant of private redress differ from those which determine the application of administrative process."

The most recent recognition we find of the independent nature of a Section 303 proceeding is *Morton vs. Local 20, Teamsters, etc., supra,* where at 320 F. (2d) 508, citing *Juneau Spruce,* the Sixth Circuit Court of Appeals stated on July 25, 1963, that:

> ". . . Congress has provided a forum by virtue of 29 U.S.C.A. §187 and this is completely independent of any National Labor Relations Board proceeding."

Appellants cite no judicial authority for their proposition that a case under 303(a)(4) is governed by 8(b)(4)(D) and 10(k) decisions, save *Penello vs. Local Union 59, Sheet Metal Wkrs., etc.,* 195 F. Supp. 458 (DC, Del., 1961).

There the Delaware District Court was concerned with a petition by the National Labor Relations Board for injunctive relief, alleging a violation of Section 8(b)(4)(D). Dupont, the employer, unwilling to incur travel pay charges for certain sheet metal work, had been using iron workers. The sheet metal workers Local No. 59 picketed the job. As a result, various employees refused to cross the picket line, including some of the iron workers. No other labor organization, trade, craft or class of employees claimed the work or threatened retaliatory action against Dupont. It was the opinion of the court, (Judge Caleb M. Wright) that Section 10(k) was applicable only to an active controversy between two opposing groups of employees and that by further interpretation 8(b)(4)(D) must be similarly limited.

The language of 8(b)(4)(D), said the court, was "extremely broad," and "would seem on its face to render illegal any coercive economic activity designed to force an employer to assign work to one group of employees rather than to another. . . . Were the naked language of §8(b)(4)(D) the only guidepost for the Court, there could be little question about the result. . . ." (p. 463). But because the Court considered that Section 10(k) could apply only to an active dispute between competing employee groups, it was reasoned that Section 8(b)(4)(D) must be similarly limited, or, as the Court said, ". . . if there is no 'dispute' which can be 'determined' by the Board under §10(k) there can be no conduct prohibited by §8(b)(4)(D)" (p. 464).

The opinion professes to be bottomed upon the Supreme Court's *Radio & Television Engineers* opinion, *supra,* but as we read that case, it goes no farther than to hold that, in a case which in fact involved disputing unions, and as to whom the employer was strictly a bystander, the Labor Board must proceed under 10(k) to "determine the dispute" before proceeding under section 10(c) to issue a "cease and desist" order (364 U.S. at 586). It would not seem to follow from such a holding that *only* an active dispute between two unions may be submitted under 10(k), that *only* a dispute cognizable under 10(k) may constitute an 8(b)(4)(D) violation and that *only* such a dispute may give rise to a claim under 303(a)(4).

The Delaware court at page 468 refused to be bound by *Juneau Spruce* although the latter had stated that "the fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by §303(a)(4)." It seized upon the word "temporarily" as a distinction and remarked that the Supreme Court in *Radio & Television Engineers* "did not consider it controlling and disposed of it simply by saying a 'substantive symmetry' between the two approaches to jurisdictional disputes is not required." This, of course, is the point we are making at this time, and it would seem that if a 303(a)(4) case is not controlling in an 8(b)(4)(D)-10(k) controversy, the same should be true in the converse, our case. The further statement that the effect of a §10(k) determination upon an action under §303(a)(4) was an open question not present-

ed in the *Radio & Television Engineers* case can hardly be said to overrule *Juneau Spruce!*

The Delaware court recognized that were the naked language of §8(b)(4)(D) its only guidepost, there could be little question about the result but, mindful of Section 10(k), concluded that 8(b)(4)(D) "does not stand alone in the statutory scheme" (p. 463). The situation is far different as to 303(a)(4) for "stand alone" it does, unaffected by 10(k) or any parallel provision. This was specifically noted by the Supreme Court in *Juneau Spruce,* where it was said that "These provisions (§10(b), (c) and (k)), limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in section 303(a)(4)" (342 U. S. at 244). It is of interest to note that the briefs of counsel for the union, as summarized at 96 L. Ed. 276, asserted an interrelation between 8(b)(4)(D), 10(k) and 303 (a)(4), contending that section 303(a)(4) must be construed in the light of 10(k) and that even if the language of 303(a)(4) were to be considered plain, its literal meaning must yield to the general purposes of the statute to avoid the unreasonable results that would otherwise follow. This argument was rejected and we have found nothing subsequent to *Juneau Spruce* to suggest that the Supreme Court would now accept it.

Penello holds only that because no other labor organization actively disputed Local 59's claim to the work, there was no "dispute" cognizable under section 10(k). This is a far cry from holding, as counsel

would interpret the case, that the employer had no claim for damages under 303(a)(4). Indeed, the court specifically stated at page 471:

> "Whether the conduct of Local 59 here violates provisions of the Act other than §8(b)(4)(D) is not an issue before the Court in this proceeding, and *nothing in this opinion should be construed as an indication that the conduct is either protected or prohibited by other provisions.*" (Our emphasis).

Thus, it would seem that the Delaware court itself carefully and expressly nullified any use of the case as authority in an action brought under 303(a)(4).

We note that in *Dooley vs. Highway Truckdrivers, etc.* 192 F. Supp. 199, Judge Edwin D. Steele, Jr., also of the Delaware District Court, in an opinion dated February 24, 1961, less than four months prior to *Penello,* doubted that *Radio & Television Engineers* required a jurisdictional dispute between competing unions. The Delaware District included a third judge, but we have no clue to his views on this question.

A DISPUTE EXISTED IN FACT

Apart from the legal question of whether a claim under 303(a)(4) requires an active "dispute" between labor groups competing for a job assignment, we cannot agree that factually there was no such controversy. The record is full of statements by appellants' own people, recognizing the existence of a "dispute" *between the unions,* extending from early April, 1957,

until at least November, 1957 (Brown depo. Ex. 4, p. 6-8; Hiller depo., Ex. 5, p. 22, 28-29, 38-39, 40-41, 46-47; RT 31-32).

Witnesses from the Ironworkers Union similarly recognized the existence of a "dispute" *between the two organizations* (Pickel depo., Ex. 8, p. 8-10, 12, 14-18; Holland depo., Ex. 7, p. 22-29, 46).

Numerous references to the "dispute" *between the Carpenters and Ironworkers* appear in the testimony of Richard James Mitchell, chairman of the National Joint Board for the Settlement of Jurisdictional Disputes (Mitchell depo., Ex. 9, p. 15-16, 21, 23, 28-29, 32, 42, 45-47).

INTERNATIONAL IS LIABLE

The trial court found that the defendant International Brotherhood, acting through its International representative, participated in and encouraged the acts of defendant Local 1849, United Brotherhood of Carpenters and Joiners of America, in inducing and encouraging its members to engage in concerted refusals in the course of their employment to work on or otherwise handle wooden forms after the same had been rigged by the members of Local 14, with the object and for the purpose of forcing and requiring Montag to assign said work to members of defendant Local 1849, rather than to members of Local 14, to whom Montag had previously assigned such work (CT 29).

Liability of the International was asserted on the theory of agency and joint tort feasor. An examination of the evidence as to what was said and what was done, seems clearly to reveal a close inter-relationship, wherein the local was seeking to attain the objectives of the International and was at all times obedient to its "stop" and "go" signals.

The record is replete with proof of the International's direct interest in and connection with the rigging problem and resultant work stoppages. The strike which commenced June 6, 1957, was no sudden "wildcat" affair called by the local on an issue unrelated to the International's activities. H. H. Brown, Carpenters Local 1849 business agent (Brown depo., Ex. 4, p. 2), had attended a meeting in Walla Walla, January 6, 1957 (id. 3) where he discussed assignments with Montag representatives, claiming "decisions from the National Joint Board giving the rigging of concrete forms to the Carpenters" (id. 4-5). The rigging of wooden forms was claimed by the Carpenters as early as March, 1957 (RT 29), or possibly before. A work stoppage had occurred in April when an Ironworker crew was assigned certain work previously performed by the Carpenters (Ex. 4, 6-7). Representative Sleeman was assigned from the Carpenters (International) to thrash out the rigging situation satisfactorily between the Carpenters and the Ironworkers, but the Ironworkers refused to go along with it. The Carpenters were instructed to go back to work pending some kind of settlement to be made *by the two Internationals* (id. 7-8). When the April 26 assignment was made to the Ironworkers, Brown

filed a protest with the company, the AGC (Associated General Contractors) manager and the Carpenters' International (id. 9, 15), citing decisions of the National Joint Board for Settlement of Jurisdictional Disputes (id. 10). Such rigging was claimed as "a tool of the trade" from "the top to the bottom" of the Carpenters' organization (id. 17). That was the Carpenters' position on the subject (id. 18).

Lyle J. Hiller, a general representative for the Carpenters' International (Hiller depo., Ex. 5, p. 22), testified that International representatives were sent in at the time of the first difficulty early in April (id. 24). He himself was officially assigned to the matter June 10 (id. 25) and met a number of times with general organizer Holland of the Ironworkers. He made a definite claim to the work and notified both parties that if an assignment was made to the Ironworkers, he would contest it (id. 28). Carpenters' General President Hutcheson wired Hiller June 19, 1957, to contact the Ironworkers' general organizer "and work out understanding along lines of agreement reached between General Presidents M. A. Hutcheson and Lyons and *see that our members return to work under said agreement*" (id. 32, our emphasis).

By telegram of August 26 (prior to the September work stoppage herein sued upon), Hutcheson advised Hiller that the two Internationals had reached an understanding (id. 40-41). About August 27, Brown, of the Carpenters' Local, *with Hiller and Hankins of the International,* appeared at the job site with a copy

of International's telegram to "advise" Montag of the agreement between the two Internationals (RT 43). Hiller thereupon reported to Hutcheson that he had "attempted to put into effect the agreement between the Ironworkers and ourselves relative to rigging concrete forms" (id. 38) and that the Ironworkers' representative had "refused to meet them" (id. 39). The shop stewards were thereafter instructed to say that the policy was placed in effect (RT 45) and the job was shut down. Joint meetings with the Ironworkers and the contractor followed. At least as early as September 17, 1957, Hutcheson was informed by the National Joint Board that the Carpenters were "still on strike in jurisdictional dispute with Ironworkers" (id. 51), but it was not until September 24 that the International representatives wired the local "to go back to work" (id. 52, 55). Although the dispute was not then resolved, the men went back to work on receipt of the telegram (Ex. 56) from Hiller and Hankins, stating "You are here instructed to notify your members to return to work at Ice Harbor Dam near Pasco, Washington, Montag-Halverson-Austin & Associates contractor at once."

Montag's superintendent Daryl Mason (RT 72) testified that he had conferred with International Carpenters' representatives regarding the assignment of rigging of wooden forms, between Christmas and New Years in 1956 (RT 73). Two Carpenter International representatives appeared at a meeting April 8, 1957 (RT 78) claiming that the Carpenters deserved and should be assigned rigging on the multi-purpose cranes (RT 79). When the June work stoppage oc-

curred and Carpenters' International representatives were sent to adjust the dispute, their position was that the dispute must first be settled before getting the men back to work, rather than putting them back to work, then proceeding with negotiations. It was not until a tentative agreement had been reached that the men went back to work (RT 88-89).

About August 27, Hiller, Hankins, Brown and another Carpenters' representative called upon Mason, showed him a telegram (RT 93) from Hutcheson, advised him the Internationals had reached an agreement and told him "that they wanted to put it into effect on the Ice Harbor Dam" (RT 94). Early in September, Mason received a phone call from Brown, advising him that the members had voted to put the telegram into effect on the job (RT 95). On the following Monday, the Carpenters refused to perform certain work. Upon contacting the head steward, he was shown a copy of the same Hutcheson telegram and was again told that they wanted the work assignment put into effect (RT 97).

The work stoppage commenced the following day and continued until the 25th during which time Mason met with Miller, Brown and Hankins (RT 98) and was in all instances told that "the dispute was to be settled before the men came back to work" (RT 99).

H. O. Montag, a member of the joint venture and project manager (RT 110), testified that when Burlingame appeared for the Carpenters' International at the April 8, 1957, meeting, he did about ninety per

cent of the talking and "repeatedly said that the rigging work on the wooden forms was the work of the carpenters and said he intended to see it was corrected" (RT 112). When Montag talked to Brown (business agent for the Local) at the time of the June stoppage, Brown stated "that he was in the right and that Mr. Hutcheson had sanctioned it and told him (Brown) that they had a job decision and that he shouldn't worry about it, or words to that effect" (RT 114). The information in the telegram of June 6 (Ex. 28), "Local business agent advises he is instructed by Hutcheson not to put the men back to work since he has won job decision at Hanford on carpenter rigging" was received from Brown (RT 115). When Montag inquired if it was Hiller's purpose to put the men back to work, he said it was. When Montag asked him "When?", Hiller answered "as soon as we get all these various angles ironed out and the dispute settled" (RT 116).

Sam Guess, executive secretary of the Associated General Contractors, Spokane Chapter (RT 128), testified that in April Burlingame, the Carpenters International representative, stated on behalf of the Carpenters union that the rigging of the wooden forms was theirs and that they were not going to let the ironworkers beat them out of it (RT 139). He, too, was told by Brown at the beginning of the June strike that he had been instructed by Hutcheson not to put his men back to work (RT 142-143). When they settled the June stoppage, Guess was told by International representatives Hiller (Carpenters) and Holland (Ironworkers) "that they would go back to work

and there would be no further work stoppages until the thing was properly handled" (RT 146).

Shortly before the September strike, Brown told Guess that an agreement had been reached between the two Internationals about the rigging and that they were going to insist that the thing be put into effect. Guess then called Hankins, who explained the agreement to him (RT 148). In a later conference with Sleeman, Hiller and Hankins, all International Carpenters, they refused to deviate from their instructions (RT 154-155).

International Brotherhood of Teamsters, etc. vs. U. S., 275 F. (2d) 610 (CCA 4, 1960), cert. den., 362 U. S. 975 (1960) is of particular interest with respect to the International Carpenters' liability. There the court considered the International constitution and by-laws of the Teamsters' Union and concluded that its locals were so under the International's domination as not to be free to pursue an independent course. Ergo, the International was liable for the acts of a local's secretary-treasurer in the furtherance of International's policies and objectives. An examination of the International Carpenter Union's Constitution and Laws reveals a remarkable similarity between the two International organizations. Section 6 of the Carpenters' Constitution, entitled "Jurisdiction," reads as follows:

> "A. Section 6. The jurisdiction of the United Brotherhood of Carpenters and Joiners of America shall include all branches of the Carpenter and Joiner trade. In it shall be vested the power

through the International Body to establish and charter Subordinate Local and Auxiliary Unions, District, State and Provincial Councils in all branches of the trade, and all other employes working in the industry, and its mandates must be observed and obeyed at all times.

"B. The right is reserved to the United Brotherhood through the International Body to regulate and determine all matters pertaining to fellowship in its various branches and kindred trades.

"C. To subordinate Local or Auxiliary Unions, District, State and Provincial Councils the right is conceded to make necessary laws for Locals and District, State and Provincial Councils which do not conflict with the laws of the International Body.

"D. The right is reserved to establish jurisdiction over any Local or Auxiliary Unions, District, State or Provincial Councils whose affairs are conducted in such a manner as to be a menace to the welfare of the International Body.

"E. The United Brotherhood shall enact and enforce laws for its government and that of subordinate Locals and Auxiliary Unions and District, State and Provincial Councils and members thereof" (Ex. 10, p. 4).

The General President (Hutcheson) may personally, or by deputy, take possession for examination of all books, papers and financial accounts of any local, summarily when necessary (id. §10-B, p. 9). He shall decide all points of law, appeals and grievances, except death and disability claims, and have power to suspend any local union subject to an appeal to the General Executive Board. Any local which wilfully or directly violates the constitution, laws, or princi-

ples of the United Brotherhood "or acts in antagonism to its welfare" can be suspended by the General President in conjunction with the General Vice-Presidents (id. §10-F, p. 9). He may order two or more locals to consolidate and enforce the consolidation, provided such course receives the sanction of the General Executive Board (id. §10-G, p. 9-10). Where a local has asked the assistance of the General Office, the General President may, with the consent of the General Executive Board, make settlement with employers, and the local must accept the same (id. §10-J, p. 10). Whenever, in the judgment of the General President, subordinate bodies or the members thereof are working against the best interests of the United Brotherhood, or are not in harmony with its constitution and laws, the General President shall have the power to order it to disband under penalty of suspension (id. §10-K, p. 10).

The First General Vice-President, under the supervision of the General President, examines and approves or disapproves all local union laws (id. §11-B, p. 11).

The General Executive Board shall have power to authorize strikes in conformity with the constitution and laws of the United Brotherhood (id. §15-E, p. 15) and may order strikes in any locality regardless of agreements that may have been entered into by any subordinate union, unless such agreements have been approved by the General President (id. §15-G, p. 15). The Board makes jurisdictional agreements with employers, provided such agreements require employers

to conform with the district trade rules (id. §15-H, p. 15).

Under the "General Laws" (Ex. 10, p. 21, et seq.), by-laws and trade rules of local unions must in no way conflict with the constitution and laws of the United Brotherhood and must be approved by the First General Vice-President (id. §25-A, p. 21). A local cannot withdraw or dissolve so long as ten members in good standing object thereto (id. §25-C, p. 21). All locals are prohibited from sending out circulars or appeals asking for financial aid in any form, except with the approval of the General Executive Board, attested by the General Secretary (id. §25-F, p. 21).

Where two or more locals exist in one city, they must be represented in a District Council and be governed by such laws and trade rules as shall be adopted by the Council and approved by the locals and First General Vice-President. The General President may order locals to affiliate with such Councils and settle their lines of jurisdiction, subject to appeal (id. §26-A, p. 21-22). The General President may form Councils in localities other than cities (id. §26-B, p. 22). District laws governing strikes must not conflict with the constitution and laws of the United Brotherhood and must be approved by the First General Vice-President (id. §26-C, p. 22). District Councils cannot debar their members from working for contractors or employers other than those connected with the employers' or builders' association (id. §26-E, p. 22).

A local's charter is at all times the property of the International (id. §29-A, p. 24). If at any time the local withdraws, lapses, dissolves, or is suspended or expelled, all its property, books, charter and funds must be forwarded immediately to the General Secretary, to be held in safekeeping for the carpenters in that locality until such time as they shall reorganize (id. §30-A, p. 24).

The International directs in detail what officers the local shall elect, how and when they shall be elected, their eligibility for office, and when they shall be installed (id. §31, p. 25-26). The General Laws spell out the requirements for removal of local officers and the appointment or election of successors (id. §32, p. 26). The duties of all local officers are prescribed in detail (id. §35-40, p. 27-30), with special provision for reports to the International (id. §35-B, p. 27; 36-D, p. 28; 37-C, p. 29; 40-C, p. 30).

Qualifications for local membership and procedure for admission of members are prescribed in detail (id. §42-A-J, p. 31-32; §43, p. 34-37).

Minimum local dues are prescribed, with provision for the payment of various charges and taxes to the International and for the suspension or lapsing of the charter for non-payment (id. §44, p. 37-38). Similar provisions are made for termination of an individual's membership for non-payment of local dues (id. §45, p. 38-39). A local is required to issue a clearance (transfer) card to any member in good

standing (id. §46-A, p. 29) and another local must accept such member (id. §46-G, p. 40).

The General Laws designate a series of "misdemeanors and penalties" requiring the fining, suspending or expelling of officers or members (id. §55, p. 47-48). What might be called capital crimes, requiring that an officer or member "be expelled and forever debarred from membership in the United Brotherhood" are committed by "any officer or member who endeavors to create dissension among the members or works against the interest and harmony of the United Brotherhood, or who advocates or encourages division of the funds or dissolution of any local union, or the separation of a local union from the United Brotherhood, or embezzles the funds" (id. §55-B, p. 27). The General Laws provide for appeals to the General President, subject to a further appeal to the General Executive Board and a final appeal to the General Convention (id. §57, p. 50-51).

The funds and property of a local may be used only for such purposes as are specified in the constitution and laws of the United Brotherhood (id. §58-A, p. 51). Trade demands must be submitted to the General Executive Board for sanction (id. §59-B, p. 53), and the laws prescribe in detail the procedure for making demands for wage increases, reduction of hours, or enforcement of trade rules (id. §59-G-I, p. 53-54).

All supplies are to be purchased from the General Secretary (id. §61, p. 58) and all locals are required to affiliate with central bodies and state federations

of the American Federation of Labor (id. §62-A, p. 58). Local meetings must be held at least once a month (id. p. 60) and the rules of order for such meetings are stated in detail by the International (id. p. 61-62).

CONTRACT BREACH NO DEFENSE

Appellants' fourth Specification of Errors as to Curtis (Appellants' Br. 18) is that by agreement with the prime contractor, appellants were entitled to certain work which was refused them, in breach of the contract, and that their refusal to continue working did not constitute conduct prohibited by Section 303 (a)(4). This, with denial of participation by International, was their principal defense at the trial on liability issues, held June 30, 1960 (CT 22). The appellee contended that breach of contract was no defense (CT 21) and the trial court so held (CT 29).

Although some National Labor Relations' Board opinions have recognized the existence of a contract assigning work as a reason to refuse injunctive relief under Section 8(b)(4)(D) (29 U.S.C.A. §158(b)(4)(D)), we have found no instance where such a defense was recognized in a damage suit based on Section 303(a)(4). A similar objection was raised in a case under Section 8(b)(4)(A) relating to "hot cargoes." *N.L.R.B. vs. Local 1976 etc.,* 241 F. (2d) 147 (CCA 9, 1957), involved a contractual provision that "workmen shall not be required to handle non-union material." When carpenters refused to handle doors

from a non-union plant, the employer asserted it as a violation of 8(b)(4)(A). The court stated at page 153:

> "An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however is presented under §8(b)(4)(A) of the Act, 29 U.S.C.A. §158(b)(4)(A), supra, when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when the object—clearly present here—is . . . forcing or requiring any employer . . . to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person."

When an opposite conclusion was reached by the District of Columbia Circuit Court of Appeals, the matter was resolved by the United States Supreme Court in *Local 1976, UBC&J vs. N.L.R.B.*, 357 U. S. 93, 2 L. Ed. 1186, 78 S. Ct. 1011 (1958). The Ninth Circuit was affirmed, the court stating that although a hot cargo clause was not of itself objectionable, it could not be enforced by the means prohibited in Section 8(b)(4)(A):

> "There is nothing in the legislative history to show that Congress directly considered the relation between hot cargo provisions and the prohibitions of §8(b)(4)(A). Nevertheless, it seems most probable that the freedom of choice for the employer contemplated by §8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation call-

ing for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is of no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties . . . (p. 105).

"The employees' action may be described as a 'strike or concerted refusal,' and there is a 'forcing or requiring' of the employer, even though there is a hot cargo provision. The realities of coercion are not altered simply because it is said that the employer is forced to carry out a prior engagement rather than forced now to cease doing business with another. . . . Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers.

"Thus inducements of employees that are prohibited under §8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision" (p. 106).

Thus it would appear that violation of a valid "hot cargo" clause, or in our case a contractual requirement that work be assigned to a particular craft, will not justify a strike as the means of enforcement.

In *United Mine Workers of America vs. Patton,* 211 F. (2d) 742, 748 (CCA 4, 1954, cert. den. 348 U. S. 824), a bargaining contract was asserted as a defense to an action for damages under 303(a)(2) (29 U.S.C.A. §187 (a)(2)). The court there stated:

> "The argument is made that the strikes here are within the exception of 29 U.S.C.A. §187(a)(2) quoted above, because the purpose of the strikes was to force plaintiffs to recognize and deal with a union with which they had a bargaining contract; but the answer is that the exception applies only where 'such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act (29 U.S.C.A. §159)', and there had been no such certification. We know of no principle of law under which we would be justified in enlarging the exception contained in the statute and we are cited to no authority which would justify such action on our part."

Thus it appears that a contractual breach will not justify the use of a strike as the means of enforcement. This is no novel concept. It is not unusual to deny the enforcement of a legal right by illegal means. By way of example, a right of property, not joined with possession, will not justify the owner in committing an assault and battery upon the person in possession for the purpose of regaining possession, although the possession is wrongfully withheld. 6 Am. Jur. (2d) 142, Assault and Battery, §169. Nor may a landlord take the law into his own hands and by force or strategy evict the tenant. *Nelson vs. Swanson,* 177 Wash. 187, 191, 31 P. (2d) 521 (1934). Many other examples will no doubt suggest themselves.

In their fifth Specification of Error (Appellants' Br. 18), appellants contend that this appellee is relegated to the same position as the prime contractor, Montag. With this we disagree. Even if by some theory

Montag were held estopped by an alleged contractual relation with the unions from any right to collect damages for work stoppages, we see no way by which we could be charged therewith. Curtis was but an innocent bystander who sustained severe losses by reason of appellants' violation of the statutory prohibition against jurisdictional strikes. Appellee was a party neither to the contract nor to its breach, if a breach there was. It was a stranger to any such agreement and was not bound by an estoppel arising therefrom.

19 Am. Jur. 639, Estoppel, §41;
19 Am. Jur. 809, Estoppel, §152, 153.

Moreover, it is the rule that neither estoppel nor private contract can be invoked successfully to avoid the requirements of legislation enacted for the protection of the public interest.

Scott Paper Co. vs. Marcalus Mfg. Co., 326 U. S. 249, 257, 90 L. Ed. 47, 66 S. Ct. 101 (1945);
19 Am. Jur. Supp., Estoppel, §41.

One cannot ordinarily be estopped to assert the direct violation of a decisive statutory prohibition.

Commissioner of Banks vs. Cosmopolitan Trust Co., 148 N. E. 609 (Mass. 1925); 41 ALR 658, 667;
19 Am. Jur. 638, Estoppel, §39.

Neither may the doctrine of estoppel be invoked to thwart declared public policy.

Peoples' National Bank vs. Manos Bros., 84 S. E. (2d) 857 (S. C., 1954); 45 ALR (2d) 1070, 1087;
19 Am. Jur. Supp., Estoppel, §39.

AMOUNT OF DAMAGES

Finally, appellants question the court's allowance of damages in the amount of $42,877.92. Their argument (Appellants' Br. 59-61) goes only to the weight of the evidence and to the sufficiency of appellee's various exhibits and schedules pertaining to damages. By the terms of the Pre-trial Order on Remaining Issues, approved by both counsel (CT 39-42), the statements of plaintiffs' accountant and attached material were admitted as Exhibits 1 and 2 and as the accountant's testimony as to appellee's damages. As contemplated by paragraph 2 of the Agreed Facts (CT 40), the accountant was cross-examined by appellants' counsel and supplemented his reports by further testimony (RT 761, et seq.). "True excerpts" of appellee's payroll for the periods involved herein, were attached (id. par. 3). It was agreed that equipment rental rates in the 1957 edition of the Associated Equipment Distributors' Rental Rate Book (Exhibit 3) provided "acceptable and proper bases for measuring the rental rate of equipment described therein for 1957" (Agreed Facts, CT 40, par. 4). The use of other rental schedules was agreed to for dump-trucks (Ex. 4) and other motor vehicles (Agreed Facts, CT 40, par. 5, 6). Replacement costs and investment were similarly established (id. par. 7).

The use of rental value to determine damages for idled plant and equipment, has many times been recognized.

15 Am. Jur. 537-8, 540, 542-3, Damages, §129, 131, 134;

Restatement of Torts, §931;

Denver Building & C. T. C. vs. Shore, 287 P. (2d) 267, 272-273 (Colorado 1955) (Work stoppage, unlawful picketing);

McGill vs. Fuller & Co., 45 Wash. 615, 617, 88 Pac. 1038 (1907) (wrongful attachment);

Stone vs. Hunter Tract Imp. Co., 68 Wash. 28, 33, 122 Pac. 370 (1912) (wrongful injunction);

Gaffney vs. O'Leary, 155 Wash. 171, 175, 283 Pac. 1091 (1929) (wrongful replevin);

Radley vs. Raymond, 34 Wn. (2d) 475, 483, 209 P. (2d) 305 (1949) (wrongful detention under possessory lien);

Holmes vs. Raffo, 60 Wn. (2d) 421, 432, 374 P. (2d) 536 (1962) (automobile collision).

The rental value of industrial plants is commonly used in determining damages for the unlawful deprivation of use.

15 Am. Jur. 542, Damages §134;
John Hutchinson Mfg. Co. vs. Pinch, 51 NW 930-932 (Mich. 1892);

Standard Supply Co. vs. Carter & Harris, 62 SE 150, 151, (S. Car. 1908);

State vs. Freeport Coal Company, 115 SE (2d) 164 (W. Va. 1960).

It was appellants' theory at the trial that appellee was limited to a recovery of interest on invested capital. The cases hold otherwise and resort to interest *only when there is a lack of proof of use or rental value.*

New York & Colo. M. S. Co. vs. Fraser, 130 U. S. 611, 32 L. Ed. 1031, 1035, 9 S. Ct. 665;

Brownell vs. Chapman, 51 NW 249, 250 (Iowa 1892);

Collins vs. Warner, 141 Wash. 162, 164-165, 251 Pac. 288 (1926);

Dunn vs. Guaranty Inv. Co. 181 Wash. 245, 248, 42 P. (2d) 434 (1935).

That the equipment and plant in question were not actually rented and would not have been rented to others during the shutdown periods, is no valid objection to the use of such values in determining damages.

Finn vs. Witherbee, 271 P. (2d) 606, 608-609 (Cal. App. 1954);

Brownell vs. Chapman, 51 NW 249, 250, *supra.*

Overhead is a recognized element of damages in a case involving work stoppages and loss of plant use.

United Electrical R. & M. Workers vs. Oliver Corp., 205 F. (2d) 376, 387-389 (CCA 8, 1953).

Finally, it must be remembered that where the right to damages is established, recovery will not be denied because the measure of damages is uncertain. The wrongdoer must bear the risk of the uncertainty which his own wrong has created.

Bigelow vs. RKO Radio Pictures, 327 U. S. 251, 264-266, 90 L. Ed. 652, 66 S. Ct. 574 (1946).

Appellants' only authority in opposition to this appellee's method of proving damages is *Flame Coal Co. vs. United Mine Workers,* 303 F. (2d) 29 (CCA 6,

1962). That case involved a claim for *lost profits* and plaintiff's evidence was prepared on a theory entirely different from ours. There, the accountant's tabulations were admitted *over defendant's objection* that they were not the best evidence and that the records from which they were prepared should have been made available at the trial for the purpose of cross-examination (p. 45). Here, the schedules were specifically admitted by agreement in the pre-trial order (CT 40) and counsel expressly stated at the trial that he had no objection to their admission (RT 966).

The schedules were prepared by the witness, Joseph P. McFarland, a certified public accountant with twenty-five years of experience (RT 952), much of it with heavy construction firms and in contract interruption and termination cases (RT 953).

Appellants state, "The court was obviously not satisfied with the proofs in the Curtis case, and certainly the appellants were not." (App. Br. 59). We agree that appellants were dissatisfied but believe counsel has overlooked the court's statement, "I make the finding, of course, that substantial damage was suffered by the plaintiff, Curtis Construction Company, as a proximate cause or as a proximate result of the shutdown for which I found liability" (RT 1183). After discussing the various items of damage, such as payroll, taxes, overhead and equipment and plant rental, the court allowed 75 per cent of the payroll claim, 50 per cent of the overhead, 25 per cent of equipment rental and 20 per cent of plant rental (RT 1183-1184). We submit that under the trial court's determination that

"substantial damage was suffered by the plaintiff, Curtis Construction Company" and under the recognized bases for determining damages supplied by appellee, the judgment must be upheld. Certainly it was within the limits of the evidence!

Appellee's figures were substantially discounted, particularly with respect to the major items for idled plant and equipment (RT 1184). We doubt that appellants seriously expect this court now to review the multitude of damage items and substitute its judgment for that of the lower court.

In conclusion, therefore, may we urge that the Curtis Construction Company judgment be affirmed as entered by the trial court.

Respectfully submitted,
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I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HART SNYDER